



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Release Number: **201011034**

Release Date: 3/19/10

Date: December 23, 2009

UIL: 664.00-00  
4941.00-00  
4947.02-00

Legend:

G =

Dear

We have considered your ruling request dated August 6, 2008, regarding the tax consequences relating to the circumstances described below.

Facts

You are an inter vivos charitable remainder unitrust created December 2, 2004, by grantor G. The intent of G was that upon her death, the trust would terminate and the principal and income would be distributed to G's private foundation. G's private foundation has been recognized as an organization exempt under section 501(c)(3) of the Internal Revenue Code ("Code") and classified as a private foundation within the meaning of section 509(a).

After G died an error was discovered in the drafting of the trust agreement. The agreement contains a clause specifying that upon the death of G, if the "donee" is not a charitable organization, then the trustee is to distribute the trust proceeds to a charity or charities as he or she determines. Article XII of the trust agreement provides that "charitable organization" shall mean an organization described in each of sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code. You represent that in drafting the definition of "charitable organization" in the trust agreement, the scrivener used certain boilerplate language, as opposed to language specific to G's intention, and included the reference to section 170(b)(1)(A) which, in effect, requests any charitable donee to be classified by the IRS as a public charity, and not a private foundation. Although G's private foundation is specifically identified as the remainder beneficiary of the trust in the trust agreement, G's private foundation does not satisfy the definition of the charitable organization in Article XII because of the definition's reference to section 170(b)(1)(A). Consequently, the foundation cannot be the

remainder beneficiary of the trust. You state that the definition should have defined a "charitable organization" to mean an organization described in section 170(c), 2055(a) and 2522(a), as that definition would have permitted G's private foundation to be the remainder beneficiary as originally desired by G.

You submitted an affidavit from the trustee and drafter of the trust agreement stating that it was at all times G's specific and strong intention that the foundation receives the assets of the trust upon her death. You state this is consistent with G's other estate planning instruments, which also left the vast majority of her estate to the foundation.

You subsequently filed a petition in the appropriate state court, seeking reformation of the trust to correct the scrivener's error by deleting the reference to section 170(b)(1)(A) of the Code in the definition of "charitable organization" in Article XII of the trust agreement. The state attorney general consented to the petition. There were no objections by any parties to the proposed reformation. Having found a scrivener's error in drafting the definition of charitable organization in Article XII of the trust agreement, the state court issued an order authorizing reformation retrospectively as to the date the trust was created. The order was made subject to a favorable ruling from the Internal Revenue Service.

#### Rulings Requested

You have requested the following rulings:

- (1) Judicial reformation of the trust, to comply with G's intent that upon death all trust proceeds would be distributed to her private foundation, will not adversely affect the trust's continuing qualification under section 664 of the Code.
- (2) Judicial reformation of the trust, as proposed, does not constitute an act of self-dealing under section 4941(d) of the Code.

#### Law

Section 664(d)(2) of the Code provides that for purposes of section 664, a charitable remainder unitrust is a trust:

(A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in section 170(c) of the Code and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in section 664(d)(2)(A) of the Code and other qualified gratuitous transfers described in section 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in section 170(c),

(C) following the termination of the payments described in section 664(d)(A) of the Code, the remainder interest in the trust is to be transferred to, or for the use of, an organization described in section 170(C) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employee securities (as defined in section 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in section 4975(e)(7)) in a qualified gratuitous transfer (as defined by section 664(g)), and

(D) with respect to each contribution of property to the trust, the value (determined under section 7520 of the Code) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 1.664-3(a)(4) of the Income Tax Regulations ("regulations") provides in part that a charitable remainder trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in section 170(c) of the Code.

Section 4941(a)(1) of the Code imposes an excise tax on each act of self-dealing between a disqualified person and a private foundation.

Section 4941(a)(2) of the Code generally imposes a tax on the participation of a foundation manager in an act of self-dealing.

Section 4941(d)(1)(E) of the Code provides that the term "self-dealing" includes any direct or indirect transfer to, or the use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

Section 4946(a) of the Code provides the term "disqualified person" with respect to a private foundation includes a substantial contributor to the foundation (including the creator of a trust), a family member of a substantial contributor (including children), and a foundation manager (including a trustee).

Section 4947(a)(2) of the Code provides generally that split-interest trusts are subject to the provisions of section 4941 in the same manner as if such trusts were private foundations, but, under section 4947(a)(2)(A), not with respect to any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under section 170(f)(2)(B), 2055(e)(2)(B), or 2522(e)(2)(B).

Section 53.4947-1(c)(2)(i) of the Foundation and Similar Excise Taxes Regulations provides that under section 4947(a)(2)(A) of the Code, section 4941 does not apply to any amounts payable under the terms of a split-interest trust to income beneficiaries unless a deduction was allowed under section 170(f)(2)(B), 2055(e)(2)(B), or 2522(e)(2)(B) with respect to the income interest of any such beneficiary.

### Analysis

Based on the information submitted and representations made, judicial reformation of the trust described above, *ab initio*, does not cause the trust to fail to qualify as a charitable remainder unitrust under section 664 of the Code. We express no opinion concerning whether the trust is or was a charitable remainder trust within the meaning of section 664.

As a charitable remainder unitrust under section 664(d)(2) of the Code, the trust is a split-interest trust described in section 4947(a)(2) and, therefore, subject to section 4941, which imposes an excise tax on acts of self-dealing.

Section 4946(a) of the Code defines a "disqualified person" to include a substantial contributor to a private foundation (including the creator of a trust), a family member of a substantial contributor (including children), and a foundation manager (including a trustee). Here, the issue is regarding which exempt organization has the remainder interest, G's foundation or a public charity, and we find that there are no disqualified persons who would benefit from the reformation. Therefore, we conclude that judicial reformation of the trust will not be an act of self-dealing under section 4941 of the Code.

### Conclusion

Accordingly, based on the foregoing facts and circumstances, we rule as follows:

- (1) Judicial reformation of the trust, to comply with G's intent that upon death all trust proceeds would be distributed to her private foundation, will not adversely affect the trust's continuing qualification under section 664 of the Code.
- (2) Judicial reformation of the trust, as proposed, does not constitute an act of self-dealing under section 4941(d) of the Code.

This ruling will be made available for public inspection under section 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Robert W. Malone  
Acting Manager, Exempt Organizations  
Technical Group 3

Enclosure  
Notice 437